Supreme Court, U.S.
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No. 10-326

In The
Supreme Court of the United States

FRANKLIN C. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

It is undisputed that the prosecutor's conduct in this case violated Rule 4.2 unless it was affirmatively "authorized by law." Yet respondent identifies not a single statute, controlling court decision, or ethics opinion providing such authorization. Rather, it only cites decisions involving different and narrower ethics rules that, unlike Pennsylvania Rule 4.2, applied only *after* the initiation of formal legal proceedings. Such decisions cannot possibly provide authorization for contacts prohibited by the broader Rule 4.2.

The only supposed "law" offered by the Third Circuit to authorize the contacts in this case was its own *post hoc* legislative judgment that restricting pre-indictment contacts was bad policy because it might hamper law enforcement. But Rule 4.2 embodies a very different policy and is designed to protect represented individuals from manipulative *ex parte* questioning by adverse attorneys seeking evidence or admissions to be used against them. It is *that* policy judgment that is controlling under both Pennsylvania and federal law, not the Third Circuit's contrary views. And the concerns animating Rule 4.2 are squarely presented by this case, where petitioner, who vigorously maintains his innocence, was repeatedly questioned and recorded at the unknown direction of AUSA Daniel, who then used those manipulated conversations against him at trial. By substituting its own policy views for those of Pennsylvania and of Congress, the Third Circuit has far exceeded its proper judicial role, created a conflict with other Circuits, and, under the government's theory treating *any* prior judicial decision as legal authorization for

future contacts, now exempted federal prosecutors from no-contact rules throughout the nation.

This Court should grant certiorari to reign in such judicial overreaching and to put an end to decades of DOJ obstruction of state and federal law requiring ethical behavior by its attorneys.

I. The Third Circuit Erroneously Exempted Federal Prosecutors from Binding Ethics Rules Based on its Own Policy Views, in Conflict with the Second and Ninth Circuits.

Respondent offers only the barest defense of the decision below. It concedes that there are no applicable Pennsylvania laws or decisions that "authorized" the contact in this case. BIO 11. It concedes that Rule 4.2 applies even pre-indictment. Pet. 5-6, 9, 14-15. It concedes that the confidential informant (Noonan) was controlled and directed by AUSA Daniel and thus was his "alter ego" for purposes of Rule 4.2. *See* Pet. 3-4, 19-20; BIO 4 (Noonan instructed "to steer the conversation toward the topics listed in the agenda letter" previously sent to petitioner; Noonan was provided a false agenda letter addressed to him in order to "focus the conversation on topics related to the government's investigation"). And it concedes that the phrase "authorized by law" requires *affirmative* authority for the conduct at issue, not merely the *absence* of a more specific Pennsylvania prohibition than that already embodied in Rule 4.2. *See* Pet. 16.

Despite such seemingly fatal concessions, the government nonetheless claims that otherwise prohibited contacts can be "authorized by law" based on prior *federal* court decisions involving earlier and

narrower versions of the no-contact rule in other States. BIO 11-12. Respondent's argument borders on the frivolous given that the decisions in question all addressed different versions of the no-contact rule that were held not to apply at all prior to the initiation of formal legal proceedings. *See* Pet. at 20-21 & n.12. But Pennsylvania's Rule 4.2 – and the ABA Rule 4.2 in general – are specifically and expressly different from the prior DR 7-104 and indisputably apply prior to the initiation of formal legal proceedings, as the Petition noted, the courts below conceded, and the government does not dispute. *See* Pet. 5-6, 9, 15.[1] For respondent to rely on such cases for "autho-

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[1] Respondent's citation, BIO at 11, to the ABA's Comment to Model Rule 4.2 regarding the possibility of authorization by "applicable judicial precedent" interpreting that Rule is substantially misleading. Pennsylvania had not adopted that comment to Rule 4.2 at the time in question. Even now under its amended Rule 4.2, Pennsylvania's official comments do not follow the ABA's comments and conspicuously exclude reference to the passage cited by respondent regarding the possibility of prior judicial decisions providing the requisite legal authorization. *See* PENN. R. PROF. CONDUCT 4.2, comment 5.

And the new Pennsylvania comments – not applicable at the time in question – note only that "[c]ommunications authorized by law *may* also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." *Id.* (emphasis added). But they also note that "[w]hen communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule." *Id.* While some use of confidential informants who are *not* acting as the "alter ego" of the prosecutor might indeed be permiss-

rization" to permit pre-indictment contacts, when Rule 4.2 differs from earlier rules *on precisely that issue*, is disingenuous at best.

Once it is recognized that prior decisions concerning the temporal limits of DR 7-104 are irrelevant to the issue of authorization under Rule 4.2, respondent's argument collapses. Respondent's and the Third Circuit's reliance on *United States* v. *Balter*, 91 F.3d 427, 435-36 (CA3), *cert. denied*, 519 U.S. 1011 (1996), BIO 12, is not only inadequate, it is pernicious. Given the conceded difference between the New Jersey and Pennsylvania rules, BIO 8, all that remains of *Balter* is the Third Circuit's *policy* arguments for refusing to apply the no-contact rule. Those policy arguments, both in *Balter* and in the decision below, were not derived from state law or state cases, or even from federal law, but were manufactured from whole cloth by the DOJ and the Third Circuit. Pet. App. A33-A34. Such free-standing judicial legislation, contrary to the policy judgments reflected in both Rule 4.2 and the McDade Amendment, pet. 14, is well beyond the proper powers of the federal courts and does not amount to "authoriz[ation] by law" for purposes of Rule 4.2.

Aside from its thin defense of the decision below, respondent argues that there is no split with the Second and Ninth Circuits and that this case involves a state-law question not worthy of this Court's review. BIO at 12-16. Both arguments are wrong.

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ible under this comment, the notion that such an exception completely swallows the rule is untenable.

Regarding the conflict with the Second Circuit's decision in *United States v. Hammad,* 858 F.2d 834 (CA2 1988), *cert. denied,* 498 U.S. 871 (1990), respondent attempts to distinguish *Hammad* based on its discussion of the prosecutor's use of a false subpoena directed at the informant, which was used to guide the discussion between the informant and the target. BIO at 13-14.

But the use of the false subpoena in *Hammad* is no different from the use of the false agenda letter given to Noonan in this case. Both were provided in order to direct the conversation between the informant and the target. Both were false and misleading and likely violated other ethics rules regarding deception. And neither was directed at the target himself or purported to put the target under any legal compulsion.

The relevance of the false subpoena in *Hammad* came not from the nature of its falsity, but from its use "to create a pretense that might help the informant elicit admissions from a represented suspect," thus converting the informant into the "alter ego of the prosecutor." 858 F.2d at 840. The sole variance in the facts between *Hammad* and this case – that the false document purported to come from a court rather than from the U.S. Attorney – is truly a distinction without a difference. What matters in both cases is that the false documents were used as props to manipulate the conversations between the informant and the target, making the informant the alter ego of the AUSA and triggering the no-contact rule.

As for the Second Circuit's subsequent decisions supposedly limiting *Hammad*, BIO at 13, neither did so in a manner relevant to the split with this case. In

United States v. *Schwimmer*, 882 F.2d 22, 29 (CA2 1989), *cert. denied*, 493 U.S. 1071 (1990), the Second Circuit held that questioning a witness in front of a grand jury did not violate the no contact rule because it was expressly authorized by the procedures for subpoenaing witnesses to appear before the grand jury. The court correctly noted that nothing in *Hammad* was to the contrary and that there was no misconduct in using the authorized grand jury procedures. Nothing in *Schwimmer* suggested that *Hammad* would not continue to apply in virtually identical situations such as presented in this Petition.

In *Grievance Committee* v. *Simels*, 48 F.3d 640, 649 (CA2 1995), the Second Circuit held that the no-contact rule of DR 7-104 did not apply to *defense counsel's* interview of a potential witness in one case who was potentially a co-defendant in a different case because such witness was not a "party" within the terms of the rule. The court's discussion of *Hammad* did not question or limit its interpretation of the "authorized by law" exception, but merely noted the need for caution when interpreting the scope of the rule in other respects.[2]

Respondent also attempts to distinguish the Ninth Circuit's conflicting decision in *United States* v. *Lopez*, 4 F.3d 1455, 1461 (CA9 1993), by arguing that it

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[2] The court also relied on its own policy concerns over an expansive rule, noting that it was not bound by state ethics rules but was instead applying exclusively federal law. 48 F.3d at 645-46. However, that was *before* the McDade Amendment, when federal courts had discretion to craft their own ethics rules. The McDade Amendment eliminated much of such discretion and mandated that the conduct of federal attorneys would be subject to state ethics rules even in federal court.

addressed post-indictment contacts, not the pre-indictment contacts at issue here. But that is once again a distinction without a difference given that there is no dispute that Rule 4.2 in this case applies *both* before and after the initiation of formal legal proceedings. That the California rule at issue in *Lopez* might not have applied at all pre-indictment is irrelevant to the construction of the phrase "authorized by law." The issue in this case does not concern the initial scope of Rule 4.2, only the scope of the exception for contacts authorized by law. *Lopez* thus properly stands for the proposition that the general authority and practices of federal prosecutors are insufficient to authorize contacts otherwise forbidden by the no-contact rule. It thus conflicts with the decision of the Third Circuit, which found just such authorization in the government's mere practices and the court's own policy views. [3]

Finally, respondent argues that this case does not warrant this Court's attention because it only involves an interpretation of state law. BIO 15-16. As noted in the Petition, however, state ethics rules throughout the country are now similar to Pennsylvania's Rule 4.2 and raise the same issues of what

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[3] While respondent correctly notes, BIO 16, that most cases concerning the no-contact rule precede the McDade Amendment, it misconceives the import of that fact. The McDade Amendment, as well as the evolution from DR 7-104 to Rule 4.2, merely *strengthened* the case for application of the no-contact rule. Cases like *Hammad* that gave proper effect to the rule before the McDade Amendment are *a fortiori* stronger now than they were before. It is only cases declining to apply the earlier and narrower rule that are weakened or made irrelevant by the McDade Amendment and Rule 4.2.

contacts are authorized by law. Pet. 11. A decision in this case thus will affect the conduct of federal prosecutors in virtually every federal court in the country, not merely in Pennsylvania.

Furthermore, because the McDade Amendment expressly makes state ethics rules applicable to federal attorneys, state law is effectively incorporated into federal law. Indeed, respondent itself notes that the local federal rules in this case also incorporated state law and that state law directs ethics issues arising in federal court back to federal court, making the interpretation of the state rule a matter of federal law. BIO 15 n. 9. Given the circularity of the relationship between the state and federal ethics rules, the only entities that are likely to address the conduct of federal prosecutors are the federal courts themselves. There is thus a significant federal interest in preventing federal courts from improperly disregarding or neutering state ethics rules.

Although state courts will certainly have the ultimate authority to define what types of contacts are authorized by law under a given State's rule, that is no reason for this Court to decline review now. Few cases involving prosecutorial contacts have come up in state court, and the issue is decided almost entirely by the federal courts, as the cases cited in the Petition and BIO demonstrate. Furthermore, the central issue here is not what is or is not authorized in any specific instance, but rather the *methodology* to be applied by federal courts in the overwhelming majority of cases where there is no specific state court ruling or law either authorizing or prohibiting pre-indictment prosecutorial contacts. The Petition thus

seeks from this Court a *default rule* for federal courts that would apply in a tremendous number of cases. That a state court in the future *might* establish a specific rule for its own jurisdiction does not diminish the need for a firm and predictable default rule in the long interim that is consistent with both the ethics rules as written and with the McDade Amendment's command that those rules be obeyed.

This Court should grant certiorari to establish a federal default rule regarding when otherwise forbidden contacts may be deemed "authorized by law," and to limit federal prosecutors and courts from manufacturing such authorization themselves. It should do so because the issue is important, arises often, and involves a split in the circuits. And it should also do so in its "supervisory capacity" over the lower federal courts. SUPREME. CT. RULE 10(a). The Third Circuit's invocation of its own policy views in place of actual legal authorization of the contacts in this case is precisely the type of judicial overreaching that calls for the exercise of this Court's supervisory authority.

II. The Third Circuit Erroneously Held that Suppression Is Not an Appropriate Remedy for Statements Obtained through Unethical Prosecutorial Conduct, in Conflict with the Second and Tenth Circuits.

Both the Second and Tenth Circuits have recognized that suppression of evidence obtained in violation of the no-contact rule is an appropriate remedy. Pet. 24. The Third Circuit's virtually categorical refusal even to consider suppression conflicts with those cases and is wrong in any event.

Respondent argues that there is no split because no court has ever suppressed evidence obtained from pre-indictment contacts with a target and that post-indictment cases are irrelevant. BIO 18-19. But that argument confuses the *applicability* of the no-contact rule with the remedy for its violation. If this Court determines that the no-contact rule indeed applies in this case, then even post-indictment cases addressing suppression are relevant authorities and are properly considered to conflict on the remedy issue. In any event, if this Court accepts the primary question regarding application of the no-contact rule, then the issue of remedy is necessarily collateral to that question.

On the merits of suppression as the appropriate remedy, respondent simply argues that suppression should be a last resort and that it is unnecessary in light of potential disciplinary penalties on attorneys violating the no-contact rule. BIO 17-18. But those arguments ignore the central purposes of the no-contact rule and the abusive tactics it was designed to remedy. The very point of the rule is to prevent the improper procurement of admissions obtained through manipulative questioning by lawyers and their proxies. Pet. 26-27. To allow such unethically obtained evidence to be admitted would undermine the very purpose of the rule. *United States* v. *Thomas*, 474 F.2d 110, 112 (CA10) ("any statement obtained by interview from [a defendant represented by counsel] may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview"), *cert. denied*, 412 U.S. 932 (1973).

Respondent also ignores this Court's decisions in *McNabb v. United States,* 318 U.S. 332, 341, 345 (1943) and *United States* v. *Payner,* 447 U.S. 727, 734-35 & n. 7 (1980), both of which amply support exclusion as the proper remedy even for non-constitutional violations in the procurement of evidence. *See* Pet. at 25-26.

As for the alternative of disciplinary proceedings to enforce the no-contact rule, it is far from clear that local state bars would have or accept jurisdiction over federal attorneys practicing in federal court, who need not be members of the bar of the State in which they practice. In any event, the threat of discipline is meager at best, has done nothing to deter the institutional intransigence of the DOJ on this issue, and is unlikely to provide such deterrence in the future. And absent the prospect of suppression, there is little incentive for defendants to raise such ethical violations in the first place. The likelihood of district courts even being made aware of the violations, much less *sua sponte* referring the matter for disciplinary proceedings, is vanishingly small. Just as in the Fourth Amendment context, therefore, any remedy short of exclusion would be "worthless and futile." *Mapp* v. *Ohio*, 367 U.S. 643, 652 (1961).

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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